

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MARK CHATMAN,

Defendant-Appellant.

UNPUBLISHED

June 25, 1999

No. 198503

Washtenaw Circuit Court

LC No. 94-003401 FC

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

CAVANAGH, J. (*dissenting*).

I respectfully dissent. Because I believe that the actions of the prosecutor irreparably tainted defendant's trial, I would reverse.

This Court reviews claims of prosecutorial misconduct case by case, examining the pertinent portion of the record to evaluate the remarks in the context they were made. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

In the instant case, the prosecutor visibly and audibly wept during her rebuttal argument. During her appeal to the jury, she had to pause to regain her composure. A sidebar was called in which the matter was apparently discussed, and the trial judge offered a tissue to the prosecutor. After the prosecutor resumed her argument, her demeanor continued to be emotional, she displayed additional tears, and she again needed to pause to regain her composure.

It is well established that a prosecutor may not appeal to the jury to sympathize with the victim. See, e.g., *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Obviously, a case involving the abuse and death of a young child will provoke an emotional reaction. Nevertheless, a prosecutor is a public official and, even in a case involving difficult subject matter, should be able to convey the facts and law without tears. Here, where the prosecutor conceded that she became "overwrought," I must conclude that defendant was denied his right to a fair and impartial trial. See *Green*, *supra*.

The majority concludes that reversal is not required because “[t]here is nothing in the record to permit this Court to conclude that the prosecutor’s display of emotion . . . was deliberately injected with the intent to elicit an emotional response from the jury.” However, “the ‘touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.’” *People v Gearns*, 457 Mich 170, 188; 577 NW2d 422 (1998) (Brickley, J.), quoting *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940, 947; 71 L Ed 2d 78 (1982). Thus, the proper area of inquiry is the effect of the prosecutor’s misconduct on the trial. See *id.* at 189. By her emotional conduct, the prosecutor injected the element of sympathy for the victim into the case. Cf. *People v Dalessandro*, 165 Mich App 569, 580-581; 419 NW2d 609 (1988). As a result, the jury may well have considered issues broader than the guilt or innocence of the accused, rather than focusing only on the evidence produced at trial. See *People v Bahoda*, 448 Mich 261, 284-285; 531 NW2d 659 (1995).

The majority concludes that relief is not warranted in part because defendant made only a general objection at trial and failed to request any specific relief. However, the sidebar appears to have been an attempt to repress the prosecutor’s display of emotion. When that proved unsuccessful, it is unclear to me what specific relief defense counsel could have sought. Defense counsel could hardly be expected, in front of the jury, to ask the trial court to “make the prosecutor stop crying.”

Furthermore, I believe that the prosecutor inappropriately disparaged the defense witness, Dr. Drajovic. While a prosecutor may attack the credibility of an expert witness, the prosecutor’s remarks here fall under the category of character assassination rather than a meritorious attack on his abilities as an expert witness. The prosecutor’s references to the Malice Green trial, a well-publicized, highly charged case, were utterly irrelevant to the present case. In addition, the repeated insinuations regarding Dr. Drajovic’s reasons for leaving his position in Wayne County, were not proper challenges to his expertise, but rather constituted a “personal attack on the defendant’s expert [that] was intended to . . . distract the jury from the real issues and required defendant to defend on an issue that was improperly before the jury.” *People v Tyson*, 423 Mich 357, 376; 377 NW2d 738 (1985). While the prosecutor’s improper questioning of Dr. Drajovic might not, standing alone, be grounds for reversal, when considered with the prosecutor’s unprofessional and prejudicial demeanor during closing argument, I conclude that the prosecutor’s misconduct denied defendant a fair trial.

I would reverse.

/s/ Mark J. Cavanagh